where physical obstacles prevent a verdict, for in such cases it may be said there was no real jeopardy, since the trial could not proceed to the stage where the jurors should give their verdict. Moreover, historical considerations further raise in this country certain constitutional objections. The old common law view was that the jury could not be discharged "except in cases of evident necessity," 4 Bl. Com. 360, meaning thereby physical necessity, such as the death or severe illness of a person necessary to the trial. Mere inability to agree was never a good ground for discharge. The jury were to be kept without meat, drink, or fire until they should reach a verdict; and if the jury were discharged because they disagreed the accused could not be tried again. *Conway and Lynch* v. *The Queen*, L. R. 9 Ir. 149. Such was the view held at the time of the adoption of the Federal Constitution and of the constitutions of the earlier states. Hence where those constitutions provide against double jeopardy, it would seem unconstitutional to hold that the accused could be retried. This was the reasoning of *Com.* v. *Cook*, 6 S. & R. 576.

It has, however, been almost universally agreed that convenience and public policy must outweigh these technical objections, and that the prisoner may be tried again. In England the rule was so settled in 1866, *Winsor* v. *The Queen*, L. R. 1 Q. B. 289; the United States Supreme Court early adopted this view, *United States* v. *Perez*, 9 Wheat. 579; and most of the state courts have followed suit. *People* v. *Greene*, 13 Wend. 55; *Com.* v. *Purchase*, 19 Mass. 521. This result is also beneficial from the defendant's point of view, for where a verdict is compelled through physical pressure it is as likely to result unadvisedly against the prisoner as in his favor. It is much better to have a system in which the unanimity of the jury shall, as is said in *Winsor* v. *The Queen*, *supra*, be the result of nothing but the unanimity of conviction, and in which, when that cannot be, a new trial may be had.

RECENT CASES.

AGENCY — FRAUDULENT WAREHOUSE RECEIPT — ESTOPPEL. — The defendant's agent fraudulently issued a warehouse receipt for grain which he had not received. The receipt was transferred to the plaintiff for value without notice. *Held*, that the defendant is estopped from denying its validity. *Fletcher* v. *Great Western Elevator Co.*, 82 N. W. Rep. 184 (S. D.).

By the great weight of authority the holder of such a receipt cannot recover in any form of action. *Grant* v. *Norway*, 10 C. B. 665; *Pollard* v. *Vinton*, 105 U. S. 7; *National Bank of Commerce* v. *Chicago, etc. R. R. Co.*, 44 Minn. 224. Some cases, however, in accord with the principal case, hold that, on account of the commercial use made of bills of lading and warehouse receipts, they are in effect representations to subsequent holders that the goods have been received, and so contract will lie. *Armour* v. *Michigan Central R. R. Co.*, 65 N. Y. 111; *Sioux City, etc. Ry. Co.* v. *First Nat. Bank*, 10 Neb. 556. But, even granting that they are such representations, it seems that the proper remedy would be in tort for the fraudulent misrepresentation, instead of on the contract by estoppel, for the subsequent holder is only an assignee of the original fraudulent holder, and is, therefore, bound by defences to an action of contract good against him. Moreover, in this case, the act of the agent is clearly without the scope of his authority, and, accordingly, the defendant can in no sense be said to have made a representation.

AGENCY — LIABILITY OF PRINCIPAL — LUMPING OF ORDERS BY AGENT. — A broker, having received orders from two separate customers for shares of a certain

stock, joined the orders and purchased the full amount from the plaintiffs. *Held*, that the sales did not bring the plaintiffs into contractual relations with either of the principals, and they are, therefore, not liable for the price. *Beckhusen* v. *Hamblet*, 16 T. L. Rep. 278 (Q. B. D.). See NOTES.

AGENCY — RATIFICATION — UNDISCLOSED PRINCIPAL. — One R. purchased grain of the plaintiffs, intending to act for the defendants, but without their authority and without disclosing his assumed agency. *Held*, that a ratification by the defendants makes them liable upon the contract. *Durant* v. *Roberts*, [1900] 1 Q. B. D. 629 (C. A.).

The question here involved comes midway between two well settled classes of cases. Where the quasi-agent in making a contract discloses his assumed authority, a subsequent ratification is effectual. *Watson* v. *Swann*, 11 C. B. N. S. 771. On the other hand, an attempt to ratify a contract made for another is a mere nullity. *Saunderson* v. *Griffiths*, 5 B. & C. 909, 915; *Richardson* v. *Payne*, 114 Mass. 429. The case is supportable, if at all, as an extension of the undisclosed principal doctrine to facts showing no actual agency, and while there appear to be no direct decisions on the point, it is opposed to numerous *dicta* and expressions of text-writers. *Wilson* v. *Tumman*, 6 M. & G. 236; Dic. Par. 132. The whole doctrine is so anomalous on principle that this extension is not surprising, but to hold that the secret intent of a contracting party makes his act that of an agent, and, therefore, subject to ratification, is certainly opposed to the general policy of the law, and from a business point of view cannot be commended.

BANKRUPTCY — PRIORITY OF CLAIMS — WAGES. — The Bankruptcy Act of 1898, in § 64 b (4), gives priority to claims for wages of workmen, clerks, and servants. *Held*, that a travelling salesman does not come within this provision. *In re Greenwald*, 99 Fed. Rep. 705 (Dist. Ct., Pa.).

Such clauses in bankruptcy laws should, it seems, for reasons of policy, be liberally construed in favor of the preference. Moreover, the tendency of the decisions has been in this direction. Thus, in England the mate of a vessel has been held a servant of the owner, *Ex parte Hamberg*, 2 Mont. D. & D. 642; and an editor of a newspaper a servant or clerk of the proprietor, *Ex parte Jennings*, 7 L. T. N. S. 601; and on exactly the facts of the principal case, the opposite result was reached, *Ex parte Neal*, Mont. & Mac. 194. Similarly, under the Act of 1867, § 28, giving priority to "claims for wages of operatives, clerks, and house servants," it was held that wages due a person hired to examine the books of the bankrupt constituted a claim entitled to priority. *Ex parte Rockett*, Fed. Cas. No. 11,977. Both on principle and authority, therefore, the result reached in the present case is questionable.

BANKRUPTCY — PROVABLE DEBTS — ARREARS OF ALIMONY. — *Held*, that arrears of alimony do not constitute a claim provable in bankruptcy. *In re Nowell*, 99 Fed. Rep. 931 (Dist. Ct, Mass.).

The same result was reached under § 19 of the Bankruptcy Act of 1867. *In re Sachmeyer*, Fed. Cas. No. 7966; *In re Foye*, Fed. Cas. No. 5021. The present Act, in § 63 (1), provides that any fixed liability absolutely owing at the time of the filing of the bankrupt's petition constitutes a debt provable against the estate. If, then, a claim for arrears of alimony is a fixed liability according to the law of the state where the allowance is made, it can be proved as a debt. *In re Challoner*, 98 Fed. Rep. 82 (Dist. Ct., Ill.); *In re Houston*, 94 Fed. Rep. 119 (Dist. Ct., Ky.). In New York and Massachusetts, however, such arrears can be reduced on application by the husband upon his showing a change in his circumstances, or in those of his wife. *In re Shepard*, 97 Fed. Rep. (Dist. Ct., N. Y.); *Southworth* v. *Treadwell*, 168 Mass. 511. The claim, therefore, is not fixed, and, accordingly, the decision in the principal case is correct.

BILLS AND NOTES — AGENCY — PAROL EVIDENCE. — A note was signed "A. B., Sec'y The X Y Co." *Held*, that, between the original parties, parol evidence of an understanding that the note should be the note of the company is admissible. *Jones* v. *Citizens' Bank of North Enid*, 60 Pac. Rep. 290 (Okla.).

The decisions on this point are in hopeless conflict. In many states the rule is that even between the original parties nothing outside of the writing itself can be looked at to determine who is liable, and the signer is held personally, on the ground that the official title added to his name is mere description. *Tucker Manufacturing Co.* v. *Fairbanks*, 98 Mass. 101, *Williams* v. *Second Nat. Bank*, 83 Ind. 237. In other jurisdictions, however, the courts have, as in the principal case, allowed parol evidence of the actual understanding in order to determine the import of the signature. *Kean* v. *Davis*, 21 N. J. Law, 683; *Metcalf* v. *Williams*, 104 U. S. 93. The latter view naturally leads to a more just result, and as any name may be adopted as a signature, there seems to be no reason why an agreement that a certain signature shall bind the prin-

cipal rather than the signer should not be given effect, at least between the parties. The principal would not, of course, be bound unless he had authorized the signature.

BILLS AND NOTES — FORGERY — RELEASE OF SURETY. — One of the makers of a note, by means of a forged signature induced the defendant to sign it as surety. *Held*, that the defendant is liable to the payee who gave value and had no notice of the fraud. *Wheeler* v. *Trader's Detosit Bank*, 55 S. W. Rep. 552 (Ky.).

The result of this decision is correct and is supported by the great weight of authority. *Selser* v. *Brock*, 3 Oh. St. 302; *Stoner* v. *Milikin*, 85 Ill. 218. *Contra*, *Green* v. *Kendy*, 43 Mich. 279. The reasoning, however, in this and many other cases is unsatisfactory. The surety does not by the nature of his contract warrant the genuineness of the signature. Nor is negligence the ground of his liability, for he is held irrespective of the amount of care used. Both of these reasons are, however, sometimes given. Moreover, the suggestion that of two innocent persons the one trusting the deceiver must suffer is too loose and indefinite a principle to furnish a sound basis for the decisions. The true ground is that the payee takes free from conflicting equities between the several makers or obligors of which he has no notice, *Selser* v. *Brock*, *supra*, for, though an immediate party to the instrument, he is, here, a *bona fide* purchaser and should have all the rights of such a purchaser. *Watson* v. *Russell*, 3 B. & S. 34; *Brooklyn, etc. Ry. Co.* v. *National Bank of the Republic*, 102 U. S. 14, 47.

BILLS AND NOTES — INDORSEMENT UNDER AN ASSUMED NAME — An impostor, assuming the name of the owner of certain real estate, managed through correspondence to procure a draft payable to him under that name. This he indorsed for value to the plaintiff. *Held*, that the plaintiff, as a *bona fide* purchaser from the person to whom the draft was sent and for whom it was intended, should be protected. *First Nat. Bank* v. *American Exch. Nat. Bank*, 63 N. Y. Supp. 58 (Sup. Ct., App. Div., First Dept.). See NOTES, 14 HARV. LAW REV. 60.

BILLS AND NOTES — NEGOTIABILITY — FORMAL REQUISITES. — *Held*, that a stipulation in a note making it payable in New York exchange does not impair its negotiability. *Clark* v. *Skeen*, 60 Pac. Rep. 327 (Kan., Sup. Ct.).

Under the general rule, that a negotiable instrument must be certain in amount, a provision like that in the principal case is held by the majority of the decisions to render the instrument non-negotiable. *Culbertson* v. *Nelson*, 93 Iowa, 187; *Nicely* v. *Winnebago Nat. Bank*, 19 Ind. App. 30. In accord with the present case, there is, however, considerable authority. *Smith* v. *Kendall*, 9 Mich. 241; *Hastings* v. *Thompson*, 54 Minn. 184. On principle, it appears that mercantile and not mathematical certainty should be the test. The addition of the current rate of exchange makes the value of the instrument more certain, and the amount is capable of easy and exact ascertainment by means entirely independent of the parties. The principal case takes the better view, therefore, in sustaining the mercantile conception that such instruments are negotiable.

CARRIERS — DELIVERY — LOSS OF LIEN. — The plaintiff, a common carrier, in ignorance of the consignee's assignment for the benefit of creditors, delivered certain goods without obtaining payment of freight. *Held*, that he is entitled to have the assignee sell the goods for the payment of his lien. *Cayo* v. *Pool's Assignee*, 55 S. W. Rep. 887 (Ky.).

It is doubtful whether any authority can be found for this result. A common law lien is a mere right to retain possession of the goods until the debt is paid, and consequently it is destroyed by delivery, unless the delivery is induced by fraud. *Kittredge* v. *Freeman*, 48 Vt. 62; *Bigelow* v. *Heaton*, 6 Hill, 43. Therefore, in the principal case the carrier, by giving up possession of the goods, lost his lien, which was his sole claim for preference over ordinary creditors. Moreover, though he made the delivery in ignorance of the consignee's insolvency, he should not be allowed to regain his lien in equity on the ground of a mistake of fact, because there was no fraud making it unjust for the consignee to hold the goods free from the lien at law. *Sears* v. *Wells*, 86 Mass. 212.

CONFLICT OF LAWS — CORPORATIONS — LIMITATIONS OF STATUTORY LIABILITIES. — The Georgia statute creating a corporation placed a twenty year period of limitation on the liability of stockholders. The Statute of Limitations on such liabilities in Maryland was three years. *Held*, in an action in Maryland after three years, that the Georgia statute governs the case, and the action will lie. *Brunswick Terminal Co.* v. *National Bank of Balt.*, 99 Fed. Rep. 635 (C. C. A., Fourth Cir.).

It is well settled that remedies are determined by the law of the forum, and that stat-

utes of limitations affect remedies but not rights. *McElmoyle* v. *Cohen*, 13 Pet. 312, 327. The exception to this rule made by the principal case, where the limitation is fixed by the same statute that creates the liability, appears indefensible. The court seems to have been misled by the fact that the action could not be brought in a foreign jurisdiction after the time of limitation fixed by the statute creating the liability has expired, because the limitation is there affixed to the right, and when the right is gone there can, of course, be no remedy. *The Harrisburg*, 119 U. S. 199. But, in the principal case, the right is admitted, and since it is purely a question of the remedy, the Maryland statute should govern.

CONSTITUTIONAL LAW — REGULATING POWER — OIL AND NATURAL GAS. — *Held*, that a statute forbidding the waste of oil and natural gas when brought to the surface is not unconstitutional as a taking of private property without due compensation, since the landowner has no title in the oil and gas until they are actually reduced by him to possession. *Ohio Oil Co.* v. *Indiana*, 20 Sup. Ct. Rep. 576.

The court employs an analogy which has frequently been used between these substances and animals *feræ naturæ*. Game laws, prohibiting the reckless slaughter of such animals, are within the police powers of the states. *State* v. *Rodman*, 58 Minn. 393. There is, however, an important distinction in that wild animals are public property, under the complete control of the state, *Geer* v. *Connecticut*, 161 U. S. 519, 525, while oil and gas are subject to the right of those who own the fee of the surface to reduce them to possession. *Jones* v. *Forest Oil Co.*, 194 Pa. 379. Moreover, it seems that the oil in the present case might well have been treated as reduced to possession by the act of bringing it to the surface. On the whole, therefore, it is to be lamented that the court did not rest its decision on the broader ground that, though the oil is private property, the public has an interest in it, and should be allowed to make any reasonable regulation necessary to preserve this interest. In this view of the case, no question of the taking of property arises.

CONSTITUTIONAL LAW — TAXATION — STATE AGENCIES. — *Held*, that a tax imposed by Congress on bonds, required from saloon keepers under state police regulations, is invalid as a tax on the means employed by the state in regulating the liquor business. *United States* v. *Owens*, 100 Fed. Rep. 70 (Dist. Ct., Mo.).

In view of the relation between the State and Federal Governments the Supreme Court has decided that neither of said governments can impose a tax upon the valid means employed by the other government in executing its constitutional powers, since, thereby, the one government would be given power to control and impede the operations of the other. *M'Culloch* v. *Maryland*, 4 Wheat. 316; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435; *Collector* v. *Day*, 11 Wall. 113. Congress accordingly cannot tax judicial process of state courts, *Fifield* v. *Close*, 15 Mich. 505, nor the official bond of a state sheriff, *State* v. *Garton*, 32 Ind. 1. This principle, however, seems incorrectly applied in the present case, since the tax in question is in no way a burden on the state or its agents. It bears solely on the saloon keeper, and instead of impeding the operations of the state it rather assists the state in its restrictive policy. Accordingly, it should have been held valid.

CONSTITUTIONAL LAW — TRIAL BY EIGHT JURORS. — The constitution of Utah provides that a jury shall, except in capital cases, consist of eight jurors. *Held*, that this does not abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property, without due process of law, and is, therefore, not in violation of the Fourteenth Amendment to the Constitution. *Maxwell* v. *Dow*, 20 Sup. Ct. Rep. 448. See NOTES.

CONTRACTS — INSANE PERSONS — EFFECT OF ADJUDICATION. — By statute the contracts of an insane person, whose insanity had been determined by adjudication, were declared absolutely void. *Held*, that a contract by one adjudged insane is valid on proof of his sanity at the time the contract was made, though he had not been readjudicated sane. *Lower* v. *Schumacher*, 60 Pac. Rep. 538 (Kan., Sup. Ct.).

Such a statute changes the common law rule as to the effect of insanity upon a contract, when it is proved in that particular way, and the question is whether the adjudication is conclusive or simply creates a presumption. As an adjudication speaks only of the time when it is made, to hold it conclusive long after that time and irrespective of changed circumstances merely because there has not been the form of a readjudication would seem absurd. There is nevertheless authority for such an interpretation of the statute. *Redden* v. *Baker*, 86 Ind. 191; *Kichne* v. *Wessell*, 53 Mo. App. 667. The better view is, however, that since the law presumes the continuance of a condition once found to exist, a judicial determination of insanity places the burden of establishing

sanity thereafter upon the one seeking to enforce the contract. *Elston* v. *Jasper*, 45 Tex. 409; *Searle* v. *Galbraith*, 73 Ill. 269; *Water Supply Co.* v. *Root*, 56 Kan. 187. This, it is true, is an exception to the general conclusiveness of judgments *in rem*, but from the nature of the subject-matter involved is logically necessary. 2 Black, Judg. §§ 795, 802.

CONTRACTS — MUTUALITY — CONTRACT TO SUPPLY BUSINESS REQUIREMENTS. — *Held*, that an agreement on the one hand to supply and on the other to buy all the ice necessary for a specified time in the business of one of the parties is not void for lack of mutuality. *Hickey* v. *O'Brien*, 82 N. W. Rep. 241 (Mich.). See NOTES.

CRIMINAL LAW — LARCENY — DISHONESTY OF PROSECUTOR. — On an indictment for larceny it appeared that the prosecutor paid money, expecting to receive counterfeit bills in exchange. *Held*, that the indictment could not be maintained because the prosecutor parted with his property for an unlawful purpose. *People* v. *Livingstone*, 62 N. Y. Supp. 9 (Sup. Ct., App. Div., Second Dept.).

In this decision the court reluctantly follows *McCord* v. *People*, 46 N. Y. 470, where the indictment was for false pretences. The reason there stated is that the law does not design the protection of rogues in their dealings with each other. Obviously, however, it is not the injury to individuals but the injury to society with which the criminal law is concerned. That injury is not lessened by the fact that the other party to the transaction is also deserving of punishment. *State* v. *Crowley*, 41 Wis. 271, which follows *McCord* v. *People*, *supra*, is decided on the ground that the statutes creating the crime of false pretences were not intended to cover such cases, but the extension of the rule to a common law crime, as in the principal case, has not even that excuse. The whole doctrine is rejected by the weight of authority. *Commonwealth* v. *Morrill*, 62 Mass. 571; *Cunningham* v. *State*, 61 N. J. Law, 67.

EQUITY — SUBROGATION — TAXES. — The plaintiff bid in land at a foreclosure sale, and, before he had paid the purchase price or acquired the legal title, voluntarily paid taxes on the property. The validity of part of these taxes was disputed by the former owners. *Held*, on the first hearing, that he cannot charge the former owner since he is not entitled to be subrogated to the rights of the city against him. *Montgomery* v. *City Council of Charleston*, 99 Fed. Rep. 825 (C. C. A., Fourth Cir.).

Held, on a rehearing, that he is entitled to subrogation to the extent of the admittedly valid taxes, but that he may not litigate the doubtful claim. *Montgomery* v. *City Council*, 99 Fed. Rep. 834.

The first decision is based on the theory that subrogation will be given only when the plaintiff has paid another's debt to free himself or his property from some liability to the creditor. *Ætna Life Ins. Co.* v. *Middleport*, 129 U. S. 534. The plaintiff, here, cannot technically claim to come within this rule since he has not the legal title to the land. Subrogation, however, is an equitable doctrine, and should not be hampered by narrow technicalities. Therefore, as the plaintiff was the substantial owner, he can hardly be called a stranger to the property, and might well have been allowed to recover. See *Mosier's Appeal*, 56 Pa. St. 76, 81. Yet, however the first decision be regarded, the modification made at the rehearing is entirely indefensible, since if the plaintiff is a mere stranger, he is entitled to nothing, *Webster's Appeal*, 86 Pa. St. 409, while, if he is not, he should clearly be allowed to litigate the whole claim for what it is worth.

EVIDENCE — NEGLIGENCE — BUSINESS USAGE. — *Held*, that the fact that the defendant's elevator was of a sort in ordinary use under similar circumstances is conclusive evidence of care on his part. *Leonard* v. *Herrmann*, 45 Atl. Rep. 723 (Pa.).

It may well be doubted, on policy, whether evidence of the customary business usage in such cases should be admitted at all, and at best it should be allowed only to assist the jury in the determination of what is reasonable care. *Martin* v. *California, etc. Ry. Co.*, 94 Cal. 326. For to hold that business usage is conclusive on the point, is to confuse evidence of the fact with the fact itself. *Maynard* v. *Buck*, 100 Mass. 40. Moreover, as a practical result of the decision, it appears that employers can completely nullify their liability for unsafe appliances, by their uniform adoption. *Wabash Ry. Co.* v. *McDaniels*, 107 U. S. 54. The case represents, however, the law of Pennsylvania. *Titus* v. *Bradford, etc. R. R. Co.*, 136 Pa. St. 618.

EVIDENCE — TRUSTS — DECLARATIONS AGAINST INTEREST. — The plaintiff, a widow, sued for dower in lands conveyed to her husband after marriage, and transferred by him to the defendant. *Held*, that the declarations of the husband, made while he was seized, that the conveyance to him was on an oral trust to convey to the defendant, are inadmissible. *Pruitt* v. *Pruitt*, 35 S. E. Rep. 485 (S. C.).

It is not clear whether the evidence in question was excluded on the ground that proof of an express trust is irrelevant, or because the evidence offered was incompetent for that purpose. It seems, however, that neither objection is tenable. It is material to show the existence of a valid trust, for if such a trust is shown the widow is not entitled to dower. *Noel* v. *Jevon*, Free. Ch. 43. Moreover, it cannot be objected that the trust was oral and, therefore, within the Statute of Frauds, for, under the statute, oral trusts are not void but are merely unenforceable. *Gardner* v. *Rowe*, 2 S. & S. 346. Hence, the lack of a writing is immaterial where the trustee has already conveyed in pursuance of his moral duty. *Main* v. *Bosworth*, 77 Wis. 660; *Oldham* v. *Gale*, 1 B. Mon. 76. Granting that proof of the trust is here relevant, evidence of the declarations made by the husband while in possession of the land and cutting down his apparent estate should have been admitted as declarations against proprietary interest. *Queen* v. *Birmingham*, 1 B. & S. 763.

INSURANCE — OWNERSHIP AND ENCUMBRANCES. — A fire insurance policy on realty contained a condition that it should be void if the interest of the insured became "other than the entire, unconditional, unencumbered and sole ownership." *Held*, that the insured does not forfeit the policy by making a written contract to convey the premises. *Arkansas Fire Ins. Co.* v. *Wilson*, 55 S. W. Rep. 933 (Ark.).

This decision is difficult to support. A contract to convey would seem to be an encumbrance, since the vendee can obtain specific performance in equity. *Rayner* v. *Preston*, 18 Ch. D. 1, 6. Some cases however hold, that the word encumbrances, as used in insurance policies, means only mortgages and liens, and not contracts to convey. *Newhall* v. *Union Mut. Fire Ins. Co.*, 52 Me. 180. Granting that such a contract is not an encumbrance, it is still hard to see, how the vendor in possession can be the entire, unconditional, and sole owner. A vendee in possession has been held to be such an owner. *Dupreau* v. *Hibernia Ins. Co.*, 76 Mich. 615; *Pelton* v. *Westchester Fire Ins. Co.*, 77 N. Y. 605. It has also been held that a vendor out of possession is not such an owner. *Clay Ins. Co.* v. *Huron Manuf. Co.*, 31 Mich. 346. The principal case can only be reconciled logically with these decisions, by saying that, in an insurance policy, entire, unconditional and sole ownership means nothing but rightful possession. This seems to carry to an unjustifiable extreme the doctrine that such contracts are to be construed most strongly against the insurers. *McAllister* v. *New Eng., etc. Ins. Co.*, 101 Mass. 588, 591.

PROPERTY — ADMINISTRATOR — BAILMENT AT WILL. — A father intrusted certain personal property to his daughter to be used for their mutual benefit. After her death her husband converted the property. Letters of administration were subsequently granted to the plaintiff, who brought replevin for the goods. *Held*, that the administrator cannot maintain the action, because the daughter's death terminated the bailment and the father alone has the right of possession. *Salter* v. *Sutherland*, 81 N. W. R. 1070 (Mich.).

For many purposes the possession of an administrator relates back to the death of the intestate. Thus he may maintain trespass for a taking of the intestate's property between the death of the latter and the grant of letters of administration. *Brackett* v. *Hoitt*, 20 N. H. 257. It is hard to see why this principle should not be applied in the present case. The death of the bailee at will clearly terminated the permission to use the property, and the bailor had the right to reclaim it immediately. But since he had not done so, the administrator may be regarded as having been in possession at the time of the conversion. Hence, he had the rights of a bailee at will, including the right of possession as against everyone except the bailor. This view was taken in a very similar case in which trover was allowed. *Fyson* v. *Chambers* 9 M. & W. 460. On the same principle that trover would lie, replevin should have been allowed in the present case, since there is no good reason for distinguishing the two causes of action. Y. B. 21 Hen. VII. 14 B; *Shaw v. Kaler*, 106 Mass. 448 (*semble*). *Contra*, *Harrison* v. *McIntosh*, 1 Johns. 380 (*semble*).

PROPERTY — ADVERSE POSSESSION — WIDOW'S QUARANTINE. — Land was sold to the plaintiff under execution without a release of dower by the execution debtor's wife. The debtor, however, remained on the land, and on his death his wife continued in possession with her children for the statutory period. After her death the plaintiff brought ejectment against the children. *Held*, that the possession of the widow, being under her statutory right of quarantine, was not adverse to the true owner's title. *Robinson* v. *Allison*, 27 So. Rep. 461 (Ala.). See NOTES.

PROPERTY — CONFUSION — DAMAGES. — The plaintiff was employed to print 5000 pamphlets from drawings furnished by the defendant. He printed 5080, intending to

keep 80 for himself. By mistake they were all delivered to the defendant, who refused to return any. *Held*, that the plaintiff cannot recover for their conversion. *Levyeau* v. *Clements*, 56 N. E. Rep. 735 (Mass.).

The court proceeds on the ground, that one, who fraudulently mixes his property with that of another, will lose what he put into the mixture, unless he can distinguish it specifically. This rule has been laid down in many cases. *Ward* v. *Ayre*, Cro. Jac. 366; *Ryder* v. *Hathaway*, 38 Mass. 298. But it is open to the objection that it awards the innocent party redress beyond his loss, and exacts, not only damages, but a penalty, from the wrongdoer. Probably the better view is, that when there has been no change of value, and the mass is homogeneous, each party is entitled to his proportionate share, irrespective of fraud. *Claflin* v. *Continental Jersey Works*, 85 Ga. 27, 46; *Hesseltine* v. *Stockwell*, 30 Me. 237. The result of the principal case is, however, correct, for the plaintiff had no right to print the extra pamphlets, and could have been enjoined from using them. *Tuck* v. *Priester*, 19 Q. B. D. 629. He suffered, therefore, no damage by their loss, and should recover nothing.

PROPERTY — RELETTING — SURRENDER. — The defendant abandoned premises which he had rented from the plaintiff, and returned the keys. The plaintiff sent them back with a letter refusing to accept the surrender, but notifying the defendant that he would relet the premises and hold him for the difference in rent. The defendant made no reply to this letter, and the plaintiff relet the premises. *Held*, that these facts show a surrender by operation of law, and, therefore, the defendant is not liable for the difference. *Gray* v. *Kaufman, etc. Co.*, 56 N. E. Rep. 903 (N. Y.).

Although doubted in *Lyon* v. *Reed*, 13 M. & W. 285, it is now settled that the granting of a new lease with the consent of the old tenant operates as a surrender by operation of law and is not, therefore, within the statute of frauds. *Nickells* v. *Atherstone*, 10 Q. B. 944; *Amory* v. *Kannoffsky*, 117 Mass. 351. But where the landlord expressly disclaims any acceptance of the surrender it has been held that this rule does not apply. *Aver* v. *Penn*, 99 Pa. St. 370; *Underhill* v. *Collins*, 132 N. Y. 271. The court distinguish the principal case on the ground that it does not appear that the defendant ever consented to have the premises relet on his account. It may be doubted if this distinction is sound. The right of the landlord to relet should not depend upon the tenant's assent, but should be rested on broader principles of policy. It is obviously unjust that the landlord should be compelled to see his property deteriorate in value for lack of occupancy. Nor should he be compelled in such a case to remain inactive and run the risk of the tenant's insolvency on penalty of losing all his rights against the tenant. Moreover, since a release lessens the damages the tenant is liable for, he can have no valid cause for complaint. Wood, *Land & T.*, 2d ed., 176.

PROPERTY — SPECIFIC PERFORMANCE — DEFECT OF TITLE. — The defendant who was in possession of land under a contract of sale from the plaintiff bought in an outstanding tax title, and then refused to carry out the contract. *Held*, that the plaintiff is entitled to specific performance. *Curran* v. *Banks*, 82 N. W. Rep. 247 (Mich.).

The court treat this case as governed by the rule that a tenant cannot dispute his landlord's title. In that case, an estoppel is raised on the ground that the tenant has agreed to pay rent in return for the possession of the land, and a defect in his landlord's title is no excuse for his refusal to pay. *Ingraham* v. *Baldwin*, 9 N. Y. 45. No such reasoning will apply to the present case, for the purchaser of land bargains for a good title, and if a bad one is offered him he has an equitable defence. *Phillip* v. *Fielding*, 2 H. Bl. 123. The result of the case is, however, thoroughly sound, for the vendor is entitled to a reasonable time to perfect his title upon notice of its defect, and, if the vendee anticipates him, a court of equity should not allow this sharp practice to be set up in defence to a suit for specific performance. *Murrell* v. *Goodyear*, 1 De G. F. & J. 432.

PROPERTY — TIDAL WATERS — POLLUTION. — The defendant was authorized by statute to empty its sewage into a river. Riparian owners above and below tide waters joined to recover damages. *Held*, that only those above tide water may recover, since the foreshore of tidal streams is owned by the state. *Simmons* v. *Mayor of Paterson*, 45 Atl. Rep. 995 (N. J., C. A.).

In accord with this case, many courts hold that land owners along tidal streams have no private riparian rights of which the state, as owner of the foreshore, may not deprive them at will. *Gould* v. *Hudson River R. R. Co.*, 6 N. Y. 522; *Stevens* v. *Paterson, etc. R. R. Co.*, 34 N. J. Law, 532. But there is at least equal authority for the opposite view. *Lyon* v. *Fishmonger's Co.*, L. R. 1 App. Cas. 662; *Bowman's Devisees* v. *Wathen*, 2 McLean, 376. Since riparian rights are merely incorporeal rights in the nature of easements appurtenant to the riparian land, there is nothing inconsistent in holding

that the state, though it owns the foreshore, owns it subject to such rights. Moreover, the basis of these rights, that the land is in justice entitled to the natural advantages of its position on the stream, applies with equal force whether the land borders on fresh or tidal waters. It seems, therefore, that the decisions opposed to the principal case reach a more sound result.

SALES — ASSIGNMENT OF BILL OF LADING — PRIVITY OF CONTRACT. — The vendor of goods stipulated to be of a certain quality, shipped them to the plaintiff, taking a bill of lading to his own order, which together with a draft on the vendee he assigned for value. The plaintiff paid the draft on receipt of the goods. *Held*, that the assignee became the owner of the goods and took the shipper's contract, and is therefore liable for defects in the goods. *Finch* v. *Gregg*, 35 S. E. Rep. 251 (N. C.).

If the shipper of goods in conformity with a contract of sale, takes a bill of lading to his own order, he retains the legal title only as security, the equitable title vesting in the purchaser, who bears the risk of loss. *Mirabite* v. *Imperial Ottoman Bank*, L. R. 3 Ex. D. 164; *Browne* v. *Hare*, 4 H. & N. 822. If, however, the goods do not conform to the contract, the entire property remains in the shipper, and passes to the purchaser only on his acceptance of the goods. *Barton* v. *Kane*, 17 Wis. 37. But in either case, the assignee of the bill of lading and accompanying draft holds the shipper's title only as security for his loan, acquiring substantially the rights of a mortgagee. Therefore, his only interest in the transaction is discharged by the payment of the draft. There is no privity between him and the purchaser, and he cannot be held, as in the principal case, except on the untenable ground that the contract runs with the bill of lading like a covenant running with the land. The only parallel case, which has been found, however, reaches the same anomalous result. *Landa* v. *Lattin*, 19 Tex. Civ. App 246.

SALES — AVOIDANCE OF CONTRACT — INNOCENT MISREPRESENTATIONS. — The plaintiff sold goods to the defendant under material representations of the latter, false in fact but made in good faith. *Held*, that the plaintiff may treat the contract as void and maintain replevin for the goods. *Kirschbaum* v. *Jasspon*, 82 N. W. Rep. 69 (Mich.).

Formerly at common law, in order to avoid a contract, except where the misrepresentation was such as to cause a failure of the consideration, it was necessary to show such actual fraud as would ground an action for deceit. *Kennedy* v. *Panama Mail Company*, L. R. 2 Q. B. 580, 587. But in equity an innocent material misrepresentation inducing the contract is sufficient, either on the ground that one ought not to get the benefit of what he now admits to be false, or that it is actual moral fraud to insist on the enforcement of a contract known to have been obtained by a falsehood. *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Daniel* v. *Mitchell*, 1 Story, 172; Benjamin, Sales, 4th ed., 446. With the introduction of equitable pleas into courts of law, the equitable rule is now properly applied at law, and thus the principal case is clearly right. *Hunt* v. *Moore*, 2 Pa. St. 105. The authorities to the contrary are ill-considered and of little weight. *Walker* v. *Hough*, 59 Ill. 375; *Faver Bower*, 33 S. W. Rep. 131 (Tex).

TORTS — IMPUTED NEGLIGENCE — BAILOR AND BAILEE. — A mule belonging to the plaintiff was injured by the concurring negligence of one who had borrowed it and the defendant. *Held*, that the bailee's negligence can be imputed to the plaintiff, and bars his recovery. *Illinois Cent. R. R. Co.* v. *Sims*, 27 So. Rep. 527 (Miss.). See NOTES.

TORTS — NEGLIGENCE — TRESPASSERS ON RAILROAD TRACK. — *Held*, that railroad employees, operating a train, are under no duty to look for trespassers on the track. *Cleveland, etc. Ry. Co.* v. *Tartt*, 99 Fed. Rep. 369 (C. C. A., Seventh Cir.). See NOTES.

TRUSTS — MORTGAGES — ATTORNEY'S FEES. — A trust mortgage deed provided that in case of sale an attorney's fee of five *per cent.* should be paid out of the proceeds. *Held*, that such provision was against public policy and void, and therefore the trustee could not pay the fee though it was reasonable. *Turner* v. *Boger*, 35 S. E. Rep. 592 (N. C.).

The objections which the court find to the present provision are that it is an agreement for a penalty, tends to the oppression of the debtor, and affords a cover for usury. On these grounds, similar provisions in promissory notes have sometimes been held void. *Boozer* v. *Anderson*, 42 Ark. 167; *Witherspoon* v. *Musselman*, 14 Bush, 214. But the better opinion and the weight of authority is that such a stipulation providing merely for the reimbursement of expenses which the default of the debtor has rendered necessary, is valid and enforcible, unless it is shown affirmatively that it was intended as a penalty or evasion of the usury laws. *Barton* v. *Farmer's Nat. Bank*, 122 Ill. 352; *Bank of Commerce* v. *Fuqua*, 11 Mont. 285, 297. The amount fixed by the

stipulation should not be conclusive, and only expenses actually and reasonably incurred should be allowed. *Campbell* v. *Worman*, 58 Minn. 561. As five *per cent.* was here conceded to be a reasonable charge and as nothing was shown to impeach the good faith of the stipulation, the decision declaring it void seems erroneous and unjust.

REVIEWS.

THE CIVIL LAW IN SPAIN AND SPANISH AMERICA. By Clifford Stevens Walton. Washington. 1900. pp. xix, 672.

This is a timely and useful book. In the first part is given a short but sufficient statement of the Spanish Codes which preceded the present law; the second part is a translation of the Spanish Civil Code of 1838, with parallel references to the South and Central American Codes; the third part is a rather meagre description of the other Spanish Codes, a translation of the Mexican Constitution, and a collection of proclamations affecting the present law of Cuba and Puerto Rico. The value of the book lies in the translation of the Civil Code, which was extended to the colonies, and is therefore the basis of the law in our newest territory. The translation is unfortunately not always commendable: hispanicisms remain to obscure the sense, and *per contra* certain terms of our own law are misapplied to unlike Spanish ideas. On the whole, however, we get from this book an adequate knowledge of part of the Spanish law. The Civil Code, as it contains the Law of Persons, the Law of Property, and the Law of Obligations, is the most interesting and perhaps the most useful of all the Codes. A translation of the Commercial Code also is sadly needed; but the Penal Code and the Codes of Procedure we can spare. It is likely that the Penal Code in Puerto Rico and the Philippines will disappear as it did in Louisiana and Texas, to be replaced bodily by the Common Law.

One of the most interesting features, to us, of the Spanish and other European laws is the doctrine of the civil status (*état civil*, *statutum personale*). The conception of a natural person whose power of legal action is a gift, not of God, but of his sovereign through the law, is foreign to the English and American mind; but it is the very foundation of the modern Civil Law. Great pains are therefore taken in this Code to secure publicity of knowledge as to civil status; a man's marriage, his sanity, his age, his legitimacy (by nature or by law), and even his presence ready to do business, may be discovered by consulting the proper "registry of civil status," just as his title to real estate may be examined at the registry of property. As is natural, this conception of legal power leads to the doctrine that capacity to act depends upon the law of a man's country.

Marital property also presents to an American lawyer a novel and interesting condition; although it is the foundation of the "community" system which prevails in the larger part of our trans-Mississippi country. As this system is worked out in Spain (and in substantially the same way in the other civil-law countries), the spouses become partners, sharing equally in the earnings and the profits of their common life. As capital the wife brings in her *dot*, the husband such portion of his property as may be agreed upon; the balance of the wife's property (her *paraphcrna*) remains her separate estate. All property falling to the